

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

77-4194

To be argued by
THOMAS J. LILLY

United States Court of Appeals

For the Second Circuit

Docket No. 77-4194

NEW YORK PRINTING PRESS AND OFFSET WORKERS
UNION, NO. 51, INTERNATIONAL PRINTING AND
GRAPHIC COMMUNICATIONS UNION, AFL-CIO,

and

LOCAL NO. 23, NEW YORK PRINTING ASSISTANTS AND
OFFSET WORKERS, INTERNATIONAL PRINTING AND
GRAPHIC COMMUNICATIONS UNION, AFL-CIO,

and

LOCAL 1, INTERNATIONAL PRINTING AND GRAPHIC
COMMUNICATIONS UNION, AFL-CIO,

Petitioners,

against

NATIONAL LABOR RELATIONS BOARD,

Respondent,

ARKAY PACKAGING CORPORATION,

Intervenor.

ON PETITION FOR REVIEW OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF ON BEHALF OF PETITIONERS

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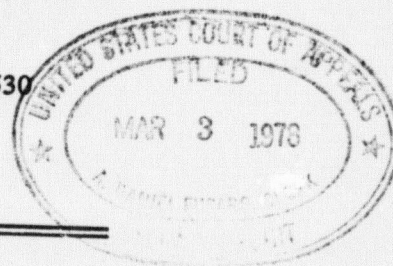


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X
NEW YORK PRINTING PRESSMEN AND OFFSET :
WORKERS UNION, NO. 51, INTERNATIONAL :
PRINTING AND GRAPHIC COMMUNICATIONS :
UNION, AFL-CIO :

Docket No. 77-4194

and :

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UNION, AFL-CIO :

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ARKAY PACKAGING CORPORATION, :

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REPLY BRIEF

Argument

THE BOARD'S REFUSAL TO APPLY THE
WELL-SETTLED PRESUMPTION OF UNION
SUPPORT BY THE STRIKER REPLACEMENTS
IS CONTRARY TO LAW AND FACTUALLY
UNFOUNDED.

Respondent in its brief contends, that upon the
refusal of the unions' members to cross the Local 119B picket

line on July 1, 1974, that the employer "immediately notified the Unions and employees that it would hire permanent replacements, unless the employees reported to work." More accurately, the employer notified the unions that it would be "free to replace" non-returned employees (A. 243a, 274- 288a). The employer never notified the unions that it had hired any new employees.

More interesting, is the reference by the respondent to Windham Community Memorial Hospital and Hatch Hospital Corp., 230 NLRB No. 156, 95 LRRM 1566 (1977). In that case, the NLRB apparently felt obligated to backstroke from its position in the instant case, Arkay Packaging Corporation, wherein the Board approved and applied a presumption that striker replacements do not desire union representation. In Windham, supra, the Board acknowledged that, ordinarily, striker replacements are presumed to support the union in the same ratio as those whom they replaced. Two Board members then proceeded to explain that they did not follow this "well-settled principle" in Arkay Packaging, "only because of the unique circumstance that the union had apparently abandoned the bargaining unit". (Member Jenkins found no need to join in the backstroke, noting that he dissented in the Arkay decision).

In effect, Board members Walther and Penello attempted in Windham, to re-write and re-rationalize themselves

out of the awkward situation they put themselves in Arkay Packaging. The reason given by the Board in Arkay for not following the "well-settled principle" was not union abandonment, but rather their abhorrence for applying the Laystrom presumption, 151 NLRB 1482, (1966), regarding newly hired employees, to striker replacements, whom the Board felt should not be presumed to support the union whose members were engaged in a walk-out.

This newly adopted position compelled a reinforcement by the Board of its position regarding union abandonment, which it attempts to do by reference to Star Mfg. Co. Div. of Star Forge, Inc. v NLRB, 536 F.2d 1192, 1194, 7th Cir, (1976) and NLRB v. Alva Allen Industries, Inc., 369 F.2d 310, 320, 8th Cir., (1966). Star, however is factually distinguishable, there being a series of unexplained indicators of a reduction in union support and activity. In the instant case, the strike by Local 119B and the walkout by petitioners' members reasonably explain the reduction in union activity. Similarly, Alva Allen, is inapposite, since there were express declarations by the union that it was not interested in representing the strikers or their replacements. In the instant case, the petitioner-unions, at the critical point in time (January, March and April 1975), when the old contracts were about to expire, expressly declared themselves ready willing and able to represent the unit employees by requesting opportunities

to negotiate new collective agreements. It was at that point in time, that the employer called in question the unions' majority status, and at that point, the applicable test, which the unions would have passed, was the willingness and ability of the unions to represent the covered employees. Pioneer Inn Associates, 228 NLRB No. 160 (1977).

CONCLUSION

The Board's refusal to presume union support among the striker replacements was unfounded in fact or in law. Petitioners request an Order of this court setting aside the decision and order of the Board, in so far as it dismissed the complaint, and in so far as it failed to find that the employer violated the Act by refusing to bargain with the petitioners, based on legally insufficient presumptions that the petitioners had lost their majority status. Petitioners further request that this cause be remanded to the Board, for further proceedings consistent with a determination that the employer did violate the National Labor Relations Act in the described manner.

Dated: Garden City, New York
March 2, 1978

Respectfully submitted,

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Petitioners,
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STATE OF NEW YORK }
CITY OF NEW YORK } ss.:
COUNTY OF NEW YORK }

Joseph Fishman , being duly sworn, deposes and

says, that he is over 18 years of age. That on the 3rd day of

March , 1978 , he served 2 copies of

the attached Reply Brief on Behalf of Petitioners on

the attorney s for the Respondent and Intervenor

herein by depositing the same, properly enclosed in a securely sealed

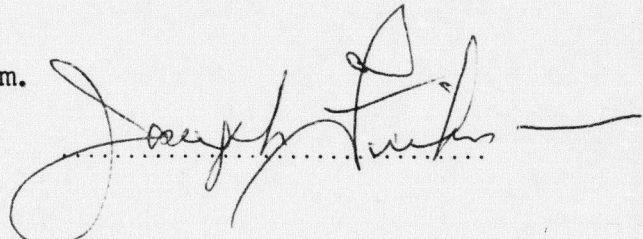
post-paid wrapper , in a U. S. Post Office at 90 Church Street, New

York City, directed to said attorney s as follows:
General Counsel Hugh P. Husband, Jr.
National Labor Relations Board Counsel for Intervenor
Attorney for Respondent 24 Washington Square, North
1717 Pennsylvania Avenue New York, New York 10011
Washington, D.C. 20570

that being the place where they maintain offices for the

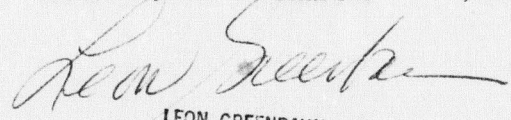
regular transaction of business, and the last address mentioned in

the papers last served by them.



Sworn to before me this

3rd day of March , 1978 .



LEON GREENBAUM
Notary Public, State of New York
No. 24-4616788 Qualified in Kings Co.
Cert. filed in New York County
Commission Expires March 30, 1979